

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION

PATRICK LEMUEL BASS)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 3:07cv887-WHA
)	
UNITED STATES OF AMERICA)	
)	
Respondent.)	

UNITED STATES’S SUPPLEMENTAL RESPONSE TO § 2255 MOTION

COMES NOW the United States of America (the “Government”) by and through its attorneys, Leura G. Canary, United States Attorney, and Andrew O. Schiff, Assistant U.S. Attorney, and in compliance with this Court’s March 27, 2008 order for the Government to address Petitioner Patrick Lemuel Bass’s allegations of ineffective assistance of counsel with respect to the issue of the filing of a notice of appeal, responds as follows.

I. PROCEDURAL HISTORY AND RELEVANT FACTS

In his plea agreement (attached as Exhibit B to the Government’s original response), Bass waived his right to appeal except in the event of prosecutorial misconduct or ineffective assistance of counsel. In Bass’s “Reply to Respondent’s Response,” Bass alleges that notwithstanding this waiver, he telephoned his counsel after sentencing and asked her to appeal the court’s application of U.S.S.G. § 2K2.1(b)(5). (Doc. 21, at p.4) In her affidavit on this issue, defense counsel states that on the date of the sentencing, she wrote Bass a letter (which she does not attach) asking Bass to contact counsel if he wished to appeal the sentence. Based on counsel’s memory and her review of the file, Bass did not request that counsel file an appeal.

Based on these facts, the court must hold a hearing to determine whether in fact Bass instructed counsel to file an appeal.

II. ARGUMENT

Because Bass claims that he instructed counsel to file an appeal, and because, if true, this would entitle him to relief, the Court must hold a hearing to determine whether or not Bass actually requested counsel to file an appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (“[A] lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable.”). In that situation, the defendant is entitled to re-entry of the judgment of conviction so that he may file a new appeal: the defendant is not required to show that the appeal would have merit or that one of the exceptions to the waiver of appeal would be applicable. *See id.*; *Gomez-Diaz v. United States*, 433 F.3d 788, 793-94 (11th Cir. 2005). When the defendant and counsel submit contradictory statements on the issue of whether defendant requested an appeal, a hearing is required. *See McElroy v. United States*, 2007 WL 4393955, *1 (11th Cir. Dec. 18, 2007) (per curiam) (unpublished).¹

¹If the Court determines that Bass did not ask counsel to file an appeal, the Court would then have to determine whether counsel consulted with Bass, and, if not, whether consultation was constitutionally required. One of the factors in determining whether consultation was required is whether the defendant demonstrated to counsel that he was interested in appealing. *See Devine v. United States*, 2008 WL 731748, *1 (11th Cir. Mar. 20, 2008). Thus, the hearing held to determine the issue of whether Bass instructed counsel to file a notice of appeal may shed light on the consultation issue as well.

Respectfully submitted this 15th day of April, 2008.

LEURA G. CANARY
UNITED STATES ATTORNEY

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participant: Patrick Lemuel Bass, Reg. No. 11872-002, Federal Correctional Complex, USP Coleman II - Unit G1, P.O. Box 1034, Coleman, Florida 33521-1034.

Respectfully submitted,

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